

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE:) Case No. 19-MD-2875-RBK-JS
)
VALSARTAN PRODUCTS LIABILITY)
LITIGATION)
) Camden, NJ
) July 10, 2019
-----) 4:04 p.m.

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE
BEFORE THE HONORABLE JOEL SCHNEIDER
UNITED STATES MAGISTRATE JUDGE

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1 (This telephone conference was heard at 4:04 p.m.)

2 THE COURT: Good afternoon, counsel. This is Judge
3 Schneider. We're on the record in in the matter of In Re:
4 Valsartan Products Liability Litigation, Docket Number 19-2875
5 -- MDL Number 2875. I know there's probably a number of people
6 on the phone. Let's just get a head count for who's on the
7 phone starting with plaintiffs.

8 MR. SLATER: Hello, Your Honor, Adam Slater for
9 advocate.

10 MR. HONIK: Ruben Honik and David Stanoch for
11 plaintiff.

12 MS. WHITELEY: Good afternoon, Your Honor, this is
13 Conlee Whitely on behalf of plaintiffs.

14 MS. GOLDENBERG: Marlene Goldenberg on behalf of
15 plaintiffs.

16 THE COURT: Okay, if that's it for plaintiffs, can we
17 get a head count for defendants?

18 MR. GOLDBERG: Your Honor, Seth Goldberg for the ZHP
19 parties and the defense group.

20 MS. LOCKARD: Your Honor, Victoria Lockard from
21 Greenberg Traurig on behalf of the Teva entities.

22 MR. SMITH: And, Your Honor, Richard Smith for
23 Torrent Pharma, Inc. and the defense group.

24 THE COURT: Okay, it sounds like that's it. I
25 received the paperwork from the parties, thank you very much,

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1 including the recent latest short form complaint draft. We can
2 discuss any issue you want to discuss. Let's start with the
3 three issues on the agenda. Why don't we start with the short
4 form complaint. If I understand the issues right, there's just
5 two material issues that the parties are in dispute about.

6 The first issue relates to whether -- and I hope I
7 have this right -- the individual plaintiffs when they filed
8 the short form complaint, have to specifically set forth their
9 fraud allegations. Am I correct about that?

10 UNIDENTIFIED SPEAKER: That's one of the issues, Your
11 Honor, yes.

12 THE COURT: All right.

13 MS. LOCKARD: Correct, Your Honor. This is Victoria
14 Lockard. And also we would -- you know, we had requested that
15 additional specific allegations be included for the express
16 warranty as well, so fraud and express warranty, that's one
17 issue, so we can address that if you like.

18 THE COURT: Right. Okay, I can hear from the
19 parties, but let me -- let me see if I understand this right
20 because this is my thinking and it may be naive because you're
21 in deeper on the issue. At some time in the case, I don't know
22 when, Judge Kugler is going to decide that.

23 There's going to be a motion to dismiss directed to
24 the master complaint. Presumably, one of the arguments that
25 the defendants are going to make is that the allegations of

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1 fraud in the master complaint are deficient, and or the
2 allegations regarding the express warranty are deficient.

3 It seems to me that however the Court rules on the
4 master complaint subsumes all of the short form complaints, so
5 if Judge Kugler rules that the fraud allegations for example in
6 the master complaint are deficient, wouldn't that apply --
7 assuming there's no other allegations in the short form
8 complaints, wouldn't that necessarily mean that all the -- the
9 fraud allegations in the short form complaints rise or fall
10 with what happens with the master complaint?

11 If I'm right about that, then why does each
12 individual plaintiff need to do anything other than simply
13 incorporate by reference the allegations in the master
14 complaint which can be done by court order? So if I'm wrong,
15 could you tell me what -- what I'm missing?

16 MS. LOCKARD: Well, Your Honor -- Victoria Lockard
17 again on behalf of the defendant, and you know, I agree with
18 you, I think that -- and you may have a crystal ball there but
19 I think we probably will be, you know, attempting to move as to
20 the master complaint on those two specific counts.

21 At this point, however, we have a lot of uncertainty
22 about how, when motions will be allowed to proceed, you know,
23 the protocol for that. And as we looked at the master
24 complaint, you know, as it is now, we don't think that the --
25 the plaintiffs have met their Rule 9 pleading requirement for

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1 these claims, you know, but we're so far not entitled to bring
2 a motion, you know, we want to make sure that we are not
3 foreclosed if for some reason we find ourselves, you know,
4 lacking the opportunity to move against the master complaint
5 and need to move against certain complaints that are
6 individualized.

7 You know, we want to make sure that -- that we're
8 able to do so. We -- at this point, we just don't know what
9 the protocol will be and how this will unfold.

10 And from our position, you know, in terms of the --
11 this paradigm for a master complaint and short form complaint,
12 you know, we don't believe that that paradigm really supports
13 the maintenance of fraud and misrepresentation claims because
14 those types of claims are so individualized and so dependent on
15 individualized facts about reliance and basis of the bargain
16 (phonetic), you know, and when and how to whom the false
17 representation was made.

18 We just don't think it's possible to adequately plead
19 those in a master complaint sufficiently and, you know, we
20 don't think the plaintiffs will be able to do it in the short
21 form either, to be frank, because we don't think that those --
22 those facts are going to be supported.

23 But we want to make sure that we've taken every
24 opportunity to get plaintiffs to take their best shot on these
25 claims so that we can then move when the Court allows us to do

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1 so and not to allow any wiggle room later on to suggest that
2 oh, well this is a master complaint so we didn't need to
3 provide any particularized allegations, you know, we just need
4 to -- to include the text generalized claims we have in there
5 currently.

6 THE COURT: What if -- what if -- I don't know the
7 exact language at this point, I haven't tried to sketch it out,
8 but what if the Court enters an order to the effect that the
9 short form complaints incorporate by reference the fraud and
10 express warranty claims that are set forth in the master
11 complaint or complaints, and unless something else is
12 specifically stated in the short form complaint, those
13 particular plaintiffs are making no further allegations.

14 So wouldn't that necessarily mean that however the
15 Court rules on the master complaint applies to each and ever
16 short form complaint?

17 Because what I would anticipate -- and I could be
18 wrong, we'll hear from the plaintiffs -- if the Court accepts
19 the defendant's position, then you're going to get hundreds of
20 complaints -- short form complaints that say we incorporate the
21 allegations from the master complaint, period. That doesn't
22 make sense to require that. So, plaintiff, what do you think?

23 MR. SLATER: You know, we're in agreement, Your
24 Honor. The master complaint is actually, as you said,
25 incorporated by reference in the short form complaint --

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1 THE COURT: I know. Yeah, it is.

2 MR. SLATER: It is. It is. It's right in the first
3 paragraph. So those allegations are incorporated and really
4 the short form complaint, the whole purpose is administrative
5 efficiency. If you just check off what claims are being
6 brought, and then if there's a need for any more particularized
7 discovery or information about a specific plaintiff's claim,
8 that gets explored, you know, through the fact sheets and then
9 obviously if they (inaudible) selected for bellwether
10 discovery, that's -- you know, they have a full and fair
11 opportunity to find out from the plaintiff if they're selected
12 this is what your case is about, this is what you're claiming,
13 what did you see, what did you read.

14 I mean, all that gets done as part of discovery. The
15 short form complaint is just -- it's really just a check box
16 process to make it efficient. It's not a discovery vehicle.

17 MS. LOCKARD: Well, with the exception of Rule 9 and
18 the requirements for -- for these specific types of claims for
19 fraud and misrepresentation, you're not allowed to wait until
20 the discovery period to uncover the facts about reliance
21 statements, when and where they -- I mean, the case law
22 establishes that has to be pled up front.

23 You can't shoot first, you know, and whatever the
24 metaphor is, but you can't -- you know, you can't just wait
25 until discovery to uncover those facts and that's what we're

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1 trying to avoid, some sort of blanket language, generalized
2 language in a master complaint.

3 They put nothing in the short forms, there are no
4 specifics and then later down the road, plaintiff wants to
5 start, you know, revealing all of these details, you know,
6 facts and allegations about an alleged misrepresentation that
7 was made, heard and relied upon, when we -- we think that the
8 Federal Rule of Civil Procedure Rule 9 requires that that be
9 put in a pleading somewhere, either in the master complaint or
10 in the short form, but it can't be omitted at this stage and
11 then later discovered.

12 THE COURT: Counsel -- but counsel -- hold on, hold
13 on. Counsel, what if there's -- I -- I'm just troubled by this
14 because I think the fraud count is much easier than the express
15 warranty issue because all of the fraud allegations are going
16 to be the same for every single plaintiff.

17 The fraud is not particular to a particular
18 plaintiff. In other words, Torrent or Teva or ZHB didn't
19 direct one-on-one any fraud to -- to those particular
20 plaintiffs, so all those fraud counts are going to rise or fall
21 together.

22 They're all going to rise or fall by the allegations
23 in the master complaint. With regard to the fraud count, why
24 are you troubled by having the individual claims of fraud rise
25 or fall by what's in the master complaint?

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1 MS. LOCKARD: Well, because I don't think the law
2 supports a finding that they all rise and fall based on
3 generalized allegations -- you know, misstatements. I think
4 that the law, at least in most of the states, you know, that
5 are implicated, requires that there be some element of
6 reliance. In other words, a showing that but for this, you
7 know, fraudulent statement and that there was someone who heard
8 and relied upon that, whether you're -- whether plaintiffs are
9 saying it was the prescribing physician or the individual
10 plaintiff, but but for hearing that fraudulent statement and
11 relying upon it, they never would have prescribed this drug.

12 So I don't think it's enough that there was just a
13 misstatement put out in the e-cert (phonetic) by Teva or
14 another defendant, I think there has to be a nexus to the
15 individual plaintiff and his or her physician to say that one
16 or the other heard that statement, you know, believed it to be
17 true, relied upon it and prescribed them this drug and would
18 have never prescribed this drug but for that specific
19 statement.

20 THE COURT: Okay. So let's -- let's assume you're
21 right just for the sake of argument. When you file your motion
22 to dismiss, wouldn't you make that argument? And if Judge
23 Kugler accepts that argument, the fraud counts are out of the
24 complaint.

25 You -- you're -- the defendants at the moment believe

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1 that the fraud counts are deficient. If they're deficient for
2 one, they're deficient for every single one. So why do you --
3 if I was you and you think the fraud counts are deficient, why
4 don't you just say to plaintiffs, do you agree to stand on your
5 allegations? Yes.

6 We can put that in a court order if you want me to,
7 so you're in a better position than if the plaintiffs are
8 required to make individual allegations. I just don't
9 understand the fraud count.

10 The express warranty is a little bit harder because
11 -- because of the individual nature of it. But would you be
12 satisfied, defendant, with a question that if there are any
13 additional fraud allegations other than what's stated in the
14 master complaint, set them forth?

15 MS. LOCKARD: Well, we like your initial proposal
16 which is an affirmative statement that there are no additional
17 supporting allegations regarding the fraud count because, you
18 know, I just want to be able to close that door.

19 And if plaintiffs are going to stand on their master
20 complaint, you know, we agree a hundred percent, you know,
21 that's what they're standing on and we'll move against that.
22 But I want to make sure we close the door on the short form and
23 we can likely work through some language to that effect that
24 says any additional supporting facts with regard to the fraud
25 should be stated, you know, otherwise there are no further

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1 allegations, you know, something to that effect.

2 THE COURT: Mr. Slater, your thoughts?

3 MR. SLATER: You know, if Your Honor wants to have a
4 -- I don't think it's necessary, we've incorporated the master
5 complaint by reference. If the master complaint -- if they
6 move against it and the fraud claim is dismissed, then the
7 fraud claims are out of all the cases.

8 If you check the fraud box, there would be no more
9 fraud claims in the master complaint, that's it, there's no
10 more fraud claim. So to me, that's the quickest and easiest
11 and I agree with you, it's all or nothing. The defense, if
12 they're going to win their motion, that's their best case.

13 I think if Your Honor orders that there be a section
14 saying if you have any additional allegations of fraud beyond
15 the master complaint, then list them; you know, I'm not going
16 to object to that, but I don't think it's necessary and it
17 actually creates more of a headache to the defense but perhaps
18 down the line, but you know, that's -- I'll live with whichever
19 way you go on that, Your Honor.

20 THE COURT: Let me put it back to you, defendant. Do
21 you want to draft a proposed order for me to sign, or would you
22 like that extra question in the short form complaint? You
23 know, I guess it would be an extra two questions -- if you have
24 any additional allegations other than what's in the master
25 complaint as to the fraud counts, set them forth; if you have

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1 any additional allegations as to the express warranty claim
2 other than what's set forth in the master complaint, set them
3 forth. What's your pleasure?

4 MS. LOCKARD: Well, out of those options I think we
5 would prefer the order essentially stating that, you know,
6 they're -- the plaintiffs are standing on the allegations in
7 the master complaint, they're not allowed to later rely upon
8 any additional allegations that -- that are presented through
9 discovery --

10 THE COURT: No, you can't say -- no, no, no, no, no,
11 you can't say that. Obviously you can't say that.

12 MS. LOCKARD: But for -- but for a pleadings
13 motion --

14 THE COURT: Oh yeah, for a pleadings motion, of
15 course.

16 MR. SLATER: But we can always -- I'm sorry to
17 interrupt, but we can always, you know, at some point amend
18 these pleadings.

19 THE COURT: Right.

20 MR. SLATER: I'm not going to be foreclosed from that.
21 I think -- I think it's clear frankly, to do nothing, at worst,
22 to add the extra question on the (inaudible) fraud. I would
23 expect in 99 percent of the cases there's going to be nothing,
24 maybe a hundred percent of the cases, because why would
25 somebody put something additional if there is something really

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1 important and compelling, which would be strange, but we have
2 an issue with entering an order that starts to determine rights
3 down the line just because -- for the reasons discussed.

4 There could be amendments, there could be something
5 that we learn later that impacts the premium or it can even be
6 that Judge Kugler, you know, says I'm not going to grant the
7 motion. I'll let plaintiffs, you know, amend. Who knows if we
8 get to that.

9 THE COURT: Defendant, add the two questions which
10 should satisfy you. You know, they're going to stand on the
11 allegations in the master complaint except if anything -- you
12 know, just try and agree on some language, a separate question
13 for the fraud and the separate question for the express
14 warranty, that the plaintiff relies on the allegations for its
15 fraud claim that are set forth in the master complaint and if
16 it has any additional allegations, they're set forth below,
17 something to that effect, okay?

18 MS. LOCKARD: All right, we'll work on that --

19 THE COURT: I think that will satisfy you.

20 MS. LOCKARD: We'll work on that language, Your
21 Honor. Thank you.

22 THE COURT: Okay. I think that satisfies you. But
23 again, I -- at the end of the day I don't see this as a big
24 issue because I think the short form complaints are going to
25 rise or fall with whatever Judge Kugler does with the master

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1 complaints, unless an individual plaintiff makes additional
2 specific allegations. And if they don't, they're just going to
3 be bound by the ruling on the master complaint.

4 Okay. The second issue has to do with this -- how to
5 list the parties, I take it. I think it's a good idea that the
6 plaintiffs check or identify what specific defendants they're
7 making claims against. I have the latest draft that was sent.
8 Is there an issue with this latest draft?

9 MS. GOLDENBERG: Your Honor, this is Marlene
10 Goldenberg. My understanding of the defendant's issue with the
11 plaintiff's draft is they just would prefer that the defendants
12 all be listed in alphabetical order which would make it very
13 difficult for a non-PSE member, plaintiff's attorney to figure
14 out which boxes they should be checking.

15 MS. LOCKARD: And if I may, Your Honor -- again,
16 Victoria Lockard. So the version that you were looking at, so
17 -- so there are several rounds of redlines back and forth so it
18 may be difficult to discern what's intended here, but
19 essentially the -- the draft that the plaintiffs proposed,
20 they've bundled defendants along the supply chain into these
21 different groupings, almost like a prefixed menu.

22 So it's like, you know, you take this API
23 manufacturer with this finished dose manufacturer with this
24 repackager and they're like a package deal. And they're
25 suggesting in the complaint that these are all -- and they even

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1 call them "related defendants" --

2 THE COURT: Oh, I see.

3 MS. GOLDENBERG: -- and our position is --

4 THE COURT: Okay.

5 MS. GOLDENBERG: -- they're not related --

6 THE COURT: I see.

7 MS. GOLDENBERG: -- and that they should have to list
8 -- we don't have to list every defendant A to Z, but let's
9 group them by --

10 THE COURT: Right.

11 MS. GOLDENBERG: -- API manufacturers --

12 THE COURT: Yeah.

13 MS. GOLDENBERG: -- A to Z and -- and retailers
14 and --

15 THE COURT: Yeah.

16 MS. GOLDENBERG: -- finished dose manufacturers --

17 THE COURT: Yeah.

18 MS. GOLDENBERG: Like I'm fine with all the Teva
19 defendants being grouped into one block, but I don't
20 necessarily want Teva grouped with Mylan and --

21 THE COURT: Yeah.

22 MS. GOLDENBERG: -- you know, AvKARE and all that.

23 MR. SLATER: You know, here's the problem, Judge --
24 it's Adam Slater -- is that as the defense said in their
25 letter, they don't think that the grouping -- forget about it

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1 saying "related defendants." That's easy, that's a word. We
2 can change that. I mean, we can call it -- we can call it
3 whatever we want, so if they want to change the title of each
4 of these sections, nobody cares.

5 But they put in their letter that our lists and our
6 groupings are not accurate. And, you know, that's what -- and
7 -- and I don't mean to step on Marlene's toes, but she's been
8 asking for this, you know, tell us the accurate groupings.

9 I mean, we're this far into the litigation and we
10 still don't have -- and remember we tried to do this earlier in
11 the litigation and, you know, we said we want, you know,
12 complete disclosure of all the supply chains, all the
13 relations, how everybody integrates together, and we don't have
14 that yet.

15 So, you know, it should be accurate and it should be
16 there and it should be easily, you know, done to where you can
17 usually figure out for somebody who manufactured it, how was it
18 distributed, all the way down to the pharmacy for the person.
19 I mean, you can figure that out if you know where to look and
20 you know how to do it.

21 But as Marlene said, we need this to be good so it's
22 easy for anybody to do it until it's accurate, so I say have
23 the defendants take -- make it accurate. Tell us what's
24 inaccurate there and put the groupings together and then, you
25 know, we'll check them.

Colloquy

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1 You know, the alternative was -- which they didn't
2 want to do, was to just literally list them all without the
3 need to chop (phonetic) and just say, because we have this
4 dismissal order on the repackagers and, you know, those who
5 make it out of the gate, these people are -- you know, they're
6 not being sued now but there's a -- there's a tolling
7 agreement, so that they're all potentially in the case.

8 I mean, but we have to be able to capture them or
9 know that they're captured administratively one way or another,
10 and if there's an accuracy issue, we need the defendants to
11 tell us exactly how these people should be grouped and these
12 entities should be grouped now. With this going to litigation,
13 I think it's time to have that done even not just for the short
14 form, but for all purposes.

15 THE COURT: Let me ask defendant, forget about
16 related defendants for the moment, talk about the different
17 groups of defendants. After the API manufacturer, what's the
18 next group of -- sort of the class of defendants? What would
19 it be? The finished-dose manufacturers?

20 MS. LOCKARD: Yes, that's -- if I understand your
21 question, that's right. So they're the -- the API manufacturer
22 who then supplies to the finished-dose manufacturer --

23 THE COURT: And after that --

24 MS. LOCKARD: -- but they're not --

25 THE COURT: Okay --

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1 MS. LOCKARD: -- they're not -- they're not always
2 lock step --

3 THE COURT: I understand. I understand. So after
4 the finished dose, would it be the repackager?

5 MS. LOCKARD: So then it would be the repackager --

6 THE COURT: Then the pharm --

7 MS. LOCKARD: -- (inaudible) --

8 THE COURT: Would it be the -- which would be next,
9 the wholesaler or the pharmacy?

10 MS. LOCKARD: So there would be in some cases a
11 labeler, distributor, but not in all cases --

12 THE COURT: Okay.

13 MS. LOCKARD: -- and then there would be wholesalers
14 and pharmacies.

15 THE COURT: So why can't we instead of grouping the
16 parties like this version that I have "related defendants," why
17 not have the groupings list the four API manufacturers, then
18 list all the finished dose manufacturers, then all the
19 repackagers, wholesalers, distributors, labelers, pharmacies,
20 have those categories instead of this "related defendant"
21 issue.

22 MS. GOLDENBERG: Your Honor, this is Marlene
23 Goldenberg, if I could chime in on that, I think the problem
24 from a practical standpoint is that -- I -- I can tell you that
25 having put together this list, this was the result of hours of

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1 pouring through recall notices that took place over a month
2 from the FDA.

3 A lot -- and I don't expect, as much as we would like
4 this to happen, that every single attorney out there in the
5 country is going to do the same thing.

6 So the problem is if they know that their client had
7 Valsartan that came from AvKARE, AvKARE under the scheme that
8 was just proposed is going to be in the repackager's grouping,
9 but that attorney doesn't know how AvKARE might be related to
10 Actavis, who then got their product from Teva Pharmaceutical
11 Industries who got it from Huahai and ZHP.

12 If we group them in the way that they're in the
13 complaint right now, it gives people a sense of which
14 defendants are in the same supply chain, and candidly, this was
15 done to make sure that people didn't get -- or sued, if you can
16 use that term in this case, because the risk that we run is if
17 a -- if an attorney doesn't know, then the prudent thing to do
18 for their client is to check all the boxes and figure it out
19 later.

20 And so we put this together with the hope that the
21 complaints would be filled out in a more precise manner and I
22 worry that a scheme where people are grouped at the level that
23 they're at in the distribution chain isn't going to be a
24 tussle.

25 THE COURT: Counsel, I'm glad you relayed that

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1 comment. Let me say this in response to that. There's a
2 couple of general themes that I think Judge Kugler and I are in
3 lockstep about and that cut across every single avenue of this
4 case.

5 One is that we want to get to the crux of the merits
6 and not be distracted by tangential issues, that's one. That's
7 why we ordered the core discovery to be produced by the
8 defendants right away.

9 The second issue is the plaintiffs have skin in this
10 game. They are not going to simply be able to fill out a piece
11 of paper and make a phone call and pursue a case in Federal
12 District Court. They're going to be subject to Rule 11.
13 They're going to be subject to Rule 26(g), and they're going to
14 be subject to the requirement that they file the Rules of
15 Procedure.

16 There's going to be consequences if plaintiffs, to
17 protect themselves, don't do due diligence and sue defendants
18 who they have no good faith basis to sue. They have to do
19 their homework. They have to do their due diligence. They
20 have to act in good faith. There's no exception to that
21 because we're in an MDL.

22 It's not a high burden, it's the same burden that
23 applies in every other case. That's why we were going to
24 require that, you know, affidavits and declarations be
25 submitted, et cetera, et cetera.

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1 We're not going to take short cuts around the Federal
2 Rules of Civil Procedure and Rule 11 and Rule 26(g) because
3 we're in an MDL.

4 In fact, because we're in an MDL, closer scrutiny
5 should be paid to that to make sure that we're only dealing
6 with potentially merit -- merit claims. So if it means a
7 plaintiff's attorney has to do due diligence before they check
8 a box, that is not a high burden and that does not create
9 problems for the Court.

10 So I do think after reviewing this that the way it's
11 set up now is confusing and could create mischief because the
12 defendants are saying that although there's relations, it's not
13 necessarily in every case, I agree with plaintiffs that it's
14 completely inappropriate to group all defendants together in
15 alphabetical order because that's as confusing.

16 It just seems to me that the most logical way to
17 group the defendant is in the class of defendants they're in --
18 API manufacturer, finished dose, repackager, et cetera, et
19 cetera. And if one company is in more than one category, so be
20 it.

21 But when the plaintiff checks that box, they're going
22 to be required -- they're going to know that they're subject to
23 Rule 11 and Rule 26(g), so I don't think that's a heavy burden
24 to require of these plaintiffs.

25 Certainly in a Federal District case where -- you

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1 know, I can just assume how much money they're going to ask for
2 at the end of the day in this case, they've got skin in the
3 game and they're going to have to do their homework before they
4 file these complaints.

5 I think that's what the defendant's concern was and
6 it's a very legitimate concern to weed out merit-less claims.
7 So my suggestion is that the parties be classified according to
8 the category they're in and we've gone through that, rather
9 than this "related defendant" category.

10 Unless you agree on if Teva and the plaintiffs agree
11 that they want to do it that way, that's fine with the Court,
12 but if they don't agree, they ought to break it up into the
13 different categories.

14 MR. SLATER: Your Honor, a question for you. If
15 we're not going to set up the short form complaint by supply
16 chain, which is really what we were trying to do to make it
17 really much more of a coherent -- what we thought was more
18 coherent, something you just -- if you know you got it from
19 this place, it goes up the chain from here and you just check
20 this box and that box and you're done, or -- or whatever boxes,
21 if you got it from more than one place, et cetera, if Your
22 Honor's ruling is group them by where they are in the supply
23 chain like (inaudible) would be together and finished dose
24 would be together, repackaging would be together, et cetera,
25 what I think we really need -- and I think we need this quickly

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1 and I think we need frankly an order from the Court that this
2 gets done quickly, is we need the defendants to commit to every
3 supply chain that applies to this litigation so that we have
4 that information so we can then circulate that to all of the
5 plaintiff's attorneys and make that available to our position)
6 of leadership so that the plaintiffs will have that information
7 and you'll have the lead list between the plaintiffs and
8 defendants so there's no dispute later about whether a party
9 belongs in a supply chain or not.

10 So that there's no mistakes, there's no confusion
11 later, I think if we're going to do it in that way, either it
12 has to be a supply chain that's confirmed as accurate in the
13 short form, or if they don't do it and they do it the way Your
14 Honor said which is -- obviously we respect that, we need them
15 to give us complete and accurate lists of every supply chain so
16 we can then circulate that to everybody so everyone knows what
17 to check the boxes on.

18 THE COURT: When you say "supply chain," Mr. Slater,
19 do you mean for example -- an easy one, the easiest one is the
20 API manufacturers, right? We know --

21 MR. SLATER: Sure.

22 THE COURT: We know who they are. You want to make
23 sure that -- what, every API manufacturer is identified or that
24 of the defendants that are named in the complaint, these are
25 the only API manufacturers?

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1 MR. SLATER: No. No, what I'm saying is if -- if you
2 have for example, you have a plaintiff whose -- whose lawyer is
3 now filling out the short form and they're figuring out who
4 they need to check the boxes on the defendants, you need to
5 know the supply chain.

6 For example, if somebody bought down the street in
7 Roseland, New Jersey at the Walgreens their Valsartan for six
8 or eight months, you can look at the -- the bottles and you can
9 look at the information and figure out if you know where you're
10 looking -- and the defendants have this information probably a
11 lot better than we do at this point -- where did that come
12 from?

13 Which -- which wholesaler or distributor would have
14 gotten into that pharmacy. And then which repackager got into
15 that distributor and which finished dose manufacturer sold it
16 to them and which line (phonetic) manufacturer did it come from
17 because, you know, that -- that can be figured out if you know
18 all the codes, et cetera.

19 But we need them to confirm each of their supply
20 chains so that plaintiff knows who to see (phonetic).
21 Otherwise, it's -- you know, it's complete guess-work and --
22 and obviously we agree, nobody should just be checking boxes
23 willy-nilly, you know, every box, just to save themselves.

24 But we need -- we need the defendants to tell us what
25 all the supply chains are so we know in a particular case if a

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1 plaintiff's bought the -- was supplied the drug by a certain
2 source, how it goes up the ladder to the API manufacturers so
3 you know who in that chain was seen in that case.

4 THE COURT: Mr. Slater that -- that sounds to me like
5 discovery. What we're trying to do is we're trying to --
6 suppose we weren't doing a short form complaint and a plaintiff
7 had to file the 47 or 48-page complaint that everybody's
8 filing. You wouldn't have the information that you're
9 requesting of the defendants before that complaint is filed,
10 right?

11 MR. SLATER: No, we didn't have it and we didn't
12 already have -- put it together. I don't think what we're
13 asking for is really discovery. I think what we're asking for
14 is basically we want to create a joint stipulated list of all
15 the supply chains so that we're all on the three basic
16 foundational level going forward in this litigation because we
17 may be wrong. I mean, we may --

18 MR. HONIK: Your Honor --

19 MR. SLATER: -- have gotten --

20 MR. HONIK: Your Honor, this is Ruben Honik. Let me
21 illustrate the problem by trying to answer your question
22 directly. If this was a one-off case and I represented a
23 person who went to CVS and got Valsartan and developed a cancer
24 which was related to the presence of NDMA, at the most, my
25 client, when -- when they come to my office in my initial due

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1 diligence which would satisfy the Federal Rules, he'd likely
2 know two things -- that he got it from CVS and it's Teva.

3 And although -- and so in filing the complaint, what
4 I would do as an attorney is to definitively state that was the
5 source, and then I would plead in the alternative that he got
6 it from one or more of the following distributors -- I'd name
7 them all.

8 I would then say it was likely repackaged by one or
9 more in the alternative of the following repackagers, on and on
10 and on, so what I would effectively be doing is identifying the
11 one or two definitive defendants, and then pleading all of them
12 in the alternative.

13 So looping back to my initial comment, we really
14 wanted to avoid that, and the easiest and best way to do it,
15 for example, is to have -- is to have Teva, to use one
16 illustration of a finished dose manufacturer, say this is the
17 only way our -- our Teva drug gets to CVS, this is the chain.

18 And it may be that in defining the chain, they may
19 say that there are two wholesalers who can produce Teva, and
20 then -- and then if that's what we have in the short form
21 complaint, we'll check the two, but we won't check four. Every
22 single finished dose defendant in this case can do that. They
23 can effectively give us a tree that says this is the only way
24 our drug get into your hand.

25 So what Adam is conveying is that if we simply have

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1 that, I guess technically is discovery, but it's so critical at
2 the outset to have an efficient process where we're not suing
3 too many manufacturers, it will allow us to have a much more
4 streamlined and efficient process where, you know, we're not
5 checking, for example, all the repackager boxes because we
6 can't be a hundred percent sure who -- who touched them in the
7 repackaging part of the distribution chain.

8 So if -- I think -- I think Your Honor is grouping it
9 the right way, but Adam's point in closing the loop is please
10 direct the defendants because they're very capable of doing
11 this. They know this information today, simply giving us a
12 simple line drawing or a tree that shows the only pathway in
13 which a consumer can get their drug.

14 MS. LOCKARD: Your Honor, if I may, now see, we've
15 heard from three of the plaintiffs --

16 THE COURT: Just identify yourself for the record,
17 please.

18 MS. LOCKARD: It's Victoria Lockard, Your Honor. So,
19 you know, I am very -- with Your Honor, concerned about putting
20 the cart before the horse on discovery here, but you know,
21 we've expanded this now from a discussion of how the defendants
22 should be listed in the short form to what type of a discovery
23 we should be providing, and it's not a simple line drawing.

24 There are upwards of 50 defendants now involved,
25 there are various permutations. However, you know, the

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1 plaintiff has as they said, they put in hours studying the
2 recall notices and they have this information. That's how they
3 came up with the groupings that are listed here.

4 So if they want to provide direction to their, you
5 know, colleagues and brethren who are going to be filing these
6 suits, you know, they can certainly do that.

7 But, you know, trying to require that, you know, we
8 produce a bunch of discovery, you know, before the complaints
9 are even filed, there's no justification for that here.

10 They have the same pleading requirements as they
11 would in any case and whereas it may not be a perfect system,
12 you know, there will be some adjustments, the parties are going
13 to have to work together to try to get the right parties in the
14 right cases, you know, we're willing to do that.

15 But -- but just the proposal has now, you know,
16 expanded well beyond that -- the scope of the discussion which
17 was just the groupings. We agree with the grouping Your Honor
18 has proposed, that's what -- that's what we proposed as well,
19 that they be grouped by category, you know, and the recall
20 notices and the other research done by plaintiffs should be
21 sufficient enough for the others to make, you know, more than
22 just wild type guesses.

23 THE COURT: Here's the -- here's the --

24 UNIDENTIFIED SPEAKER: And all we'd ask them to do is
25 to say whether the groupings as we've gotten it is correct or

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1 not. That's all.

2 THE COURT: Here's the --

3 UNIDENTIFIED SPEAKER: I mean, it shouldn't be a
4 shell game where we have to guess whether what we have is
5 correct.

6 THE COURT: Here's the Court's ruling with regard to
7 the second issue on the short form complaint. The defendants
8 shall be organized according to the category or class of
9 defendants they're in. You know better than me what the
10 categories are -- API manufacturers, finished dose
11 manufacturers, repackagers, pharmacies, wholesalers, labelers,
12 distributors.

13 I don't know if there's any more. Different
14 companies may fit into different categories. Let's get a draft
15 with that layout with the two questions that we talked about
16 are going to be answered, and we'll see if we have any other
17 issues. If we could finalize this in two weeks at the in-
18 person conference and just -- I'm just reluctant to require the
19 defendants to give discovery in order to have plaintiffs file a
20 short form complaint, the purpose of which is to save
21 plaintiffs time and effort.

22 I don't think the short form complaint requires a
23 plaintiff to do anything other than what they're required to do
24 if they have to file a normal complaint.

25 Mr. Honik, I'm not so sure I agree with what you said

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1 would happen if this was a one-off case. I don't think you --
2 I think you would sue CVS, I think you would sue whoever you
3 knew supplied CVS, and then -- and then after the complaint's
4 filed, you'd get discovery and you'd amend your complaint.

5 There might be Rule 11 problems if you say well, it
6 may be this other company and to protect ourselves, we're going
7 to sue them. I don't think you would do that.

8 You might name John Does, but and that's an idea,
9 maybe you should add John Does to each category to protect the
10 plaintiffs if they don't know who it is. So that's the Court's
11 direction. Let's see what it looks like at the next conference
12 and hopefully it will finalize it by then.

13 All right, so that takes care of the two issues with
14 regard to the short form complaint.

15 The plaintiff fact sheets, are we going to be able to
16 finalize that in two weeks?

17 UNIDENTIFIED SPEAKER: If you make us we will.

18 THE COURT: What's the status of it?

19 UNIDENTIFIED SPEAKER: Drafts of the redlines have
20 been exchanged, we're talking, we're trying to narrow the
21 issues. I would expect, Your Honor, that there are definitely
22 going to be some disputed issues in terms of scope of what's
23 being sought through these.

24 THE COURT: Okay, let's --

25 UNIDENTIFIED SPEAKER: The fact sheets in this

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1 litigation, there's no doubt there will be some disputes for
2 you --

3 THE COURT: Yes.

4 UNIDENTIFIED SPEAKER: -- but I would think, you
5 know, in two weeks we should be able to at least narrow down --
6 and there will probably be some categories of disputes frankly
7 but nothing, you know, --

8 THE COURT: Okay.

9 UNIDENTIFIED SPEAKER: -- repeat.

10 THE COURT: Okay, why don't we raise all disputes in
11 time to be addressed and decided at the next conference. You
12 know, we promised Ms. Cohen that this would be a priority item
13 and we're going to follow through with that.

14 In a few days the defendants are going to get --
15 plaintiffs are going to get defendant's core discovery so we'd
16 like to start getting discovery in defendant's hands.

17 MS. LOCKARD: And we agree -- it's Victoria Lockard,
18 Your Honor, and Ms. Cohen couldn't be here, she's in Court
19 today, but she did want me to make sure that we were vocal on
20 this, that it is -- it remains important to her, so we want to
21 get this finalized and we'll -- we'll roll up our sleeves with
22 plaintiff's counsel and try to get as much of it hashed through
23 as we can before the next conference.

24 THE COURT: Yes, we'll just get all disputes
25 resolved. I don't think this is heady stuff, so we should be

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1 able to get through it pretty fast. Dismissal of peripheral
2 defendants -- I know that's a difficult issue. I'm guessing
3 the parties are working on that. It's probably not close to
4 being resolved, but hopefully the parties are continuing their
5 discussions.

6 MS. GOLDENBERG: Yes, Your Honor, this is Marlene
7 Goldenberg, we've had productive -- a productive session the
8 other day and another one that was productive as well this
9 morning.

10 THE COURT: Okay. So let's discuss it at the next
11 conference, but this is a ticklish issue and I understand why
12 it's going to take time to get this finalized, so it sounds
13 like the parties are acting in good faith so we'll just keep on
14 that track.

15 MR. SLATER: And, Your Honor, just to -- earlier when
16 I was -- I was speaking, I think somebody jumped in, I was
17 almost done. The last thing I was going to say frankly is that
18 the need for the confirmation that we understand the supply
19 chains and how everybody relates to them in other words, is
20 actually also going to be important in terms of our willingness
21 to dismiss the so called "peripheral defendants" --

22 THE COURT: Yes.

23 MR. SLATER: -- because we need to know where every
24 one of them fits into every supply chain. So we don't need --
25 we don't need it for a short form complaint, but we do need

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1 it --

2 THE COURT: Yes.

3 MR. SLATER: -- to determine the peripheral
4 defendants and also to understand everything we're going to be
5 reading so again, I would urge the Court, they're not asking
6 for anything other than for us to be able to send them our
7 understanding of the supply chain and then for them to get back
8 to us and tell us what's accurate or inaccurate or what's
9 missing, just so that everybody is playing on the same 100-yard
10 field going forward and everybody knows who everybody is.
11 Because again, we're going to need that before we can dismiss
12 anyone from the case and know where they fit in anyway.

13 THE COURT: Mr. Slater, I think you took the words
14 out of my mouth because when it comes to the dismissal issue,
15 plaintiff has to be satisfied before it agrees to dismiss the
16 defendant that they have the relevant information they need to
17 evaluate that defendant, so I think it behooves the defendants
18 if they want to get out of the case to give plaintiff what they
19 want, which would include the sort of information that you're
20 looking for.

21 So we'll discuss this further in two weeks, but I'm
22 on the same page as you. The Court is not going to force the
23 plaintiffs to dismiss defendants, it can't do that. It will
24 encourage plaintiffs to do that.

25 But in order for plaintiffs to do that, the Court

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1 recognizes that plaintiffs have to be satisfied they have the
2 relevant information to make that informed choice which would
3 include the sort of information you're asking for, Mr. Slater.
4 So I think with regard to that issue, I think we're on the same
5 page, so let's discuss that further in two weeks.

6 Okay, that concludes the three items on the agenda.
7 Are there any other issues that we need to address on this
8 call? The next call we'll hopefully finalize the short form
9 complaint, we'll decide the disputes regarding the fact sheets,
10 further discuss this peripheral defendant issue and this
11 information that plaintiffs need for that. I'm not sure, what
12 other issues come up --

13 MR. GOLDBERG: Your Honor --

14 THE COURT: -- in order to advance the ball, we
15 already set up conferences for when we're going to address any
16 disputes regarding the insurance disclosures and core
17 discovery, so that's in place. Are there any other issues --

18 MR. GOLDBERG: Your Honor --

19 THE COURT: -- we need to discuss?

20 MR. GOLDBERG: Your Honor, this is Seth Goldberg. We
21 included in defendant's submission that we -- that we submitted
22 yesterday in number four just to give Your Honor -- to alert
23 the Court that in two of the State Court --

24 THE COURT: Oh.

25 MR. GOLDBERG: -- actions that are pending in New

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1 Jersey --

2 THE COURT: Okay.

3 MR. GOLDBERG: -- we have a case management
4 conference on July 18th. Judge Kugler last -- at the last
5 conference said he was going to be reaching out to you --

6 THE COURT: Yes.

7 MR. GOLDBERG: -- this Court. I just want to alert
8 the Court in case that those calls hadn't yet been made --

9 THE COURT: Yes.

10 MR. GOLDBERG: -- it would be helpful if they are in
11 advance of the conferences last -- next week.

12 THE COURT: Thanks for reminding me of that, Mr.
13 Goldberg. He's not in today, Judge Kugler, but I'll be in
14 contact with him and knowing Judge Kugler, he'll make -- if he
15 hasn't already done it, he'll be in contact with them before
16 the conference. But your suggestion is a good one.

17 MR. GOLDBERG: Thank you, Your Honor.

18 THE COURT: All right, oh, on the MDL -- on the MDL
19 front, Mr. Honik, anything happen with that?

20 MR. HONIK: We're continuing to own our petition and
21 we're on track to get it on file so as to be heard in
22 September.

23 THE COURT: Great. Are there any other issues or
24 matters you'd like to address on this call, counsel? We'll
25 draft an order just confirming what we've discussed today.

1 Anything else we need to discuss?

2 MR. GOLDBERG: Nothing from defendants, Your Honor.

3 MR. SLATER: Nothing from the plaintiffs.

4 THE COURT: Thank you, counsel, we're adjourned.

5

6 (Matter concluded, 4:56 p.m.)

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10 **C E R T I F I C A T I O N**

11

12 I, Diane Gallagher, court approved transcriber,
13 certify that the foregoing is a correct transcript from the
14 official electronic sound recording of the proceedings in the
15 above-entitled matter.

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